



# Immigration Litigation Bulletin

Vol. 8, No. 2

VISIT US AT: <https://oil.aspensys.com>

February 27, 2004

## SUPREME COURT TO CONSIDER REPATRIATION AND DUI ISSUES

On February 23, 2004, the Supreme Court granted, over the Solicitor General's opposition, petitions for certiorari filed in two immigration cases raising the issues of repatriation to a country without a functioning central government, and whether a conviction for driving while intoxicated is a crime of violence. *Jama v. INS*, 329 F.3d 630 (8th Cir. 2003), cert. granted No. 03-674; *Leocal v. Ashcroft*, No. 14992 (11th Cir. June 30, 2003), cert. granted No. 03-553.

**There is currently a conflict among the circuits as to whether a DUI conviction constitutes a "crime of violence."**

The petitioner in *Jama* is a native of Somalia, who entered the United States as a refugee. He has been ordered removed as an alien who has been convicted of "a crime involving moral turpitude." A district court blocked the execution of the removal order finding that under INA § 241(b) petitioner could not be removed to Somalia unless that government accepted his return. However, because Somalia lacked and continues to lack a functioning government, DHS has been unable to obtain Somalia's prior acceptance. The government appealed contending, *inter alia*, that prior acceptance was not statutorily required.

The Eighth Circuit agreed with the government's contention. The court considered the plain language of INA § 241(b) which sets forth a progressive three-step process for determining a removable alien's destination country. If the alien cannot be removed under steps one and two, then the third step of

the process, permits the removal of the alien to a list of additional countries. Clause four of this last step permits the removal of an alien to a country in which the alien was born. Clause seven provides that "if impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, [the Attorney General can remove the alien to] another country whose government will accept the alien into that country." The INS sought to remove the petitioner under clause four of the last  
*(Continued on page 2)*

## COURT ORDERS RECAPTURE OF UNUSED ASYLEE ADJUSTMENT NUMBERS

In *Ngwanyia v. Ashcroft*, \_\_F.Supp.2d\_\_, 2004 WL 286106 (D. Minn. February 12, 2004) (Kyle, J.), the District Court of Minnesota granted summary judgment to a class of asylees who challenged the defendants' administration of the adjustment process for asylees, specifically the failure to use all the adjustment numbers and the agency's practices for granting employment authorization.

Under INA § 209(b), the Attorney General, and now the Secretary of DHS, may, subject to certain requirements, adjust the status of an alien granted asylum to that of an alien lawfully admitted for permanent residence (LPR). This statute limits the number of adjustments to "not more than 10,000 . . . in any  
*(Continued on page 2)*

## EIGHTH ANNUAL LITIGATION CONFERENCE SET FOR WASHINGTON, D.C., MAY 4-6

The Eighth Annual Immigration Litigation Conference, sponsored by the Civil Division's Office of Immigration Litigation, will be held on May 4-6, 2004, in Washington, D.C., in the Great Hall of the Robert F. Kennedy Building. The theme of this year's Conference, "Immigration in Transition - Challenges at our Border and Before the Courts" reflects the impact

of the restructuring of immigration responsibilities at our borders and in the federal courts. Additionally, the Conference will present various panels addressing of topics of current interest, including immigration crimes, the detention and repatriation of criminal aliens, asylum and withholding of removal, and relief under the Convention  
*(Continued on page 14)*

### Highlights Inside

<i>ALIEN INFORMERS &amp; STATE-CREATED DANGER</i>	3
<i>TRAFFICKING VICTIMS PROTECTION ACT</i>	5
<i>CIS PROPOSES FEES INCREASE</i>	5
<i>SUMMARIES OF RECENT COURT DECISIONS</i>	7

## SUPREME COURT

(Continued from page 1)

step. The court held that, under the plain language of the statute and “as matter of simple statutory syntax and geometry” the acceptance requirement in the statute is confined to clause seven and does not apply to the other clauses, including clause four.

In opposition to the petition for certiorari, the government argued that the decision of the court of appeals correctly concluded that the absence of a functioning government in Somalia does not preclude petitioner’s removal to that country under INA § 241(b)(2)(E)(iv).

In *Leocal* the petitioner challenges the BIA’s determination that his conviction for driving under the influence which resulted in serious bodily injury is a “crime of violence” under 18 U.S.C. § 16(a), thus rendering him removable for a conviction of an aggravated felony. The BIA followed *Le v. U.S. Attorney General*, 196 F.3d 1352 (1999), where the Eleventh Circuit had determined that a conviction of DUI causing serious bodily injury was an aggravated felony under the immigration laws because that offense is a “crime of violence.” Petitioner did not seek a stay of his removal and in November 2002, he was removed to Haiti. The Eleventh Circuit, in an unpublished order, found jurisdiction to consider the petition, notwithstanding petitioner’s removal, but determined that *Le* was a binding precedent. Consequently, the court dismissed the petition for lack of jurisdiction under INA § 242(a)(2)(C), which denies courts jurisdiction to review final orders entered against certain criminal aliens.

There is currently a conflict among the circuits as to whether a DUI conviction constitutes a “crime of violence” under 18 U.S.C. §§16(a)-(b), and thus a removable offense under the INA.

By Francesco Isgro, OIL  
Contact: Greg Mack, OIL  
☎ 202-616-4858

## COURT ORDERS RECAPTURE OF ADJUSTMENT NUMBERS

(Continued from page 1)

fiscal year.” Since 1992, the Attorney General had set aside the full 10,000 numbers authorized by the statute. However, the numbers were not used, despite there being a waiting list of applicants. Between 1994 and 2002, a total of 21,822 numbers went unused and were not carried over to the next fiscal year.

The plaintiffs claimed that the defendants “unlawfully withheld agency action” when they permitted the set aside numbers to lapse at the end of the year. The government argued that the adjustment figures expired at the end of each fiscal year and that the statute provides no authority to retroactively grant adjustment using a prior fiscal year’s allotment. The court found that while the statute authorizes a maximum of 10,000 numbers each year, on its face, it “plainly imposes no temporal limit on the use of asylee adjustment numbers.” Likewise, the court found that 8 C.F.R. § 209.2, the implementing regulation, “does not require that admission number unused for adjustment expire at the end of each fiscal year.” The court refused to defer to the agency interpretation, calling the lapse of numbers policy an “addendum” to the statute and “agency action unlawfully withheld or unreasonably delayed” under 5 U.S.C. § 706(1). “Defendants have, without statutory or regulatory authority, refused to use over twenty-thousand refugee admission numbers made available for the adjustment of asylees by the President and Congress,” concluded the court.

The court noted that under INA § 209(c)(1)(B), following a grant of asylum the defendants must authorize the asylee to work in the United States “for as long as they remain asylees,” and provide documents that reflect that authorization. The defendants acknowledged that they provide “no one particular form of endorsement of

employment authorization.” While the primary form is the Employment Authorization Document (EAD), which an alien obtains when granted asylum by an Asylum Officer, aliens granted asylum by EOIR must apply for work authorization. These asylees are usually given authorization by the endorsement of their I-94. Employment authorization must be renewed every year at the cost of \$120.00.

The court found that the employment procedures “verge on the Kafkaesque” and arbitrarily depended on whether the asylee was granted asylum by the EOIR or by an asylum officer with the BCIS. More perplexing to the court, was defendants’ explanation for limiting the work employment validity to one year. As declared by a DHS officials, “current machines do not allow for manufacture of a card with a validity period of longer than one year.”

The court found defendants’ violations “to constitute nothing short of a national embarrassment.” The court found that the burden for obtaining work authorization had been improperly placed on the asylees granted asylum by the EOIR, and that the defendants did not provide asylees with employment authorization “coterminus with status” as mandated by the statute.

The court ordered that the unused refugee admission numbers since 1992 be made available to asylees and that defendants provide endorsement of employment authorization to all asylees upon grant of asylum that is coterminus with the asylee’s status. The court stayed its order pending appeal.

By Francesco Isgro, OIL

Contact: Greg Mack, OIL  
☎ 202-616-4858

**“Defendants have, without statutory or regulatory authority, refused to use over twenty-thousand refugee admission numbers.”**

## ALIEN INFORMERS AND "STATE-CREATED DANGER"

The substantive due process doctrine of "state-created danger" can come into play when the government uses an alien involved in criminal pursuits as an informant. As part of the alien's plea agreement, or otherwise, a law enforcement official may agree to recommend a downward departure of sentence in exchange for the alien's assistance. Because most serious criminal convictions are grounds for removal, such an alien is amenable to removal proceedings. After a subsequent removal proceeding, the alien may challenge his removal order by invoking the "state-created danger" doctrine, alleging that he will be harmed if returned to his homeland in retaliation for the assistance which he provided to the government.

**The Department disagrees with the expansion of the doctrine to the cases of alien informants, because this is contrary to substantive due process jurisprudence.**

The Department disagrees with the expansion of the doctrine to the cases of alien informants, because this is contrary to substantive due process jurisprudence. Courts are fashioning a form of protection which does not exist in the applicable statutes and regulations, which already provide for asylum, withholding of removal, and protection under the Convention Against Torture where an alien would be in danger if returned to his homeland. The issue is significant given the number of criminal aliens removed every year. These cases can be difficult to litigate, particularly where government officials are on record acknowledging that the alien faces serious danger if removed because of his assistance to the government as an informant.

### ORIGINS OF THE "STATE-CREATED DANGER" DOCTRINE

In general, the government's failure to protect an individual against private violence does not constitute a violation of the due process clause. In

*DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 200 (1989), the Court held that a social services agency that had reason to believe a boy was being abused by his father but did not act to remove him from his father's custody did not violate the boy's due process rights. However, the Court suggested that the State may violate the Due Process Clause if there exists some "special relationship" between the State and the individual, and a government official affirmatively and with willful and reckless disregard ("shocking the conscience") places the individual in the way of proximate harm that is reasonably foreseeable. Based on this statement, a number of circuit courts have recognized a "state-created danger"

exception to the general rule in two types of situations: (1) in custodial and other settings in which the State has limited an individual's right to care for himself; and (2) when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced. *See, e.g., Kneipp v. Tedder*, 95 F.3d 1199, 1211 (3d Cir. 1996) (§1983 action alleging police officers were deliberately or recklessly indifferent in allowing extremely intoxicated pedestrian to walk home alone at night in Pennsylvania January); *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993) (§1983 action alleging police officers conspired with "skinheads" to permit the latter to beat up demonstrators with relative impunity); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (§1983 action alleging that state trooper left woman alone at night beside road in a known high-crime area); *Gregory v. City of Rogers*, 974 F.2d 1006 (8th Cir. 1992)(*en banc*) (§ 1983 action alleging police acted with reckless indifference in leaving two intoxicated persons with car keys in car parked outside police station); *Bowers*

*v. DeVito*, 686 F.2d 6161 (7th Cir. 1982) (§1983 action alleging state officers and physicians acted with reckless indifference in releasing mental patient who had previously committed murder).

The first case to apply the "state-created danger" doctrine to a removal proceeding was *Wang Zong Xiao v. Reno*, 81 F.3d 808 (9th Cir. 1996). In *Wang*, an alien paroled into the United States to testify in an international drug conspiracy trial brought an action against the government for injunctive relief to prohibit his removal from the United States or his return to China. The court found that "the government created a special relationship with Wang by paroling him into the United States and placing him in custody." Characterizing the government's behavior as "reckless," the court stated that if the government had not intervened, "Wang would have earned leniency in China and would have been able to stay in his homeland."

### THE "STATE-CREATED DANGER" DOCTRINE APPLIED TO INFORMANTS

In non-immigration cases, the government frequently has been successful in overcoming claims invoking the "state-created danger" doctrine. *See Summar v. Bennett*, 157 F.3d 1054 (6th Cir. 1998); *Dykema v. Skoumal*, 261 F.3d 701 (7th Cir. 2001). Nevertheless, alien informants recently have raised successfully the "state-created danger" doctrine and requested permanent injunctions of removal in a number of habeas cases challenging removal orders in district court. In *Rosciano v. Sonchik*, No. CIV 01-0472-PHX-JATMS, 2002 WL 32166630, the sister of an alien died under suspicious circumstances after the alien, arrested for a drug offense, agreed to inform in connection with a plea agreement. Government lawyers advised the alien that she was unlikely to be deported, but an immigration judge so ordered and the BIA af-

(Continued on page 4)

## Alien Informers & "State Created Danger"

(Continued from page 3)

firmed. The district court granted her habeas petition and the government did not appeal.

The alien also prevailed in *Builes v. Nye*, 239 F.Supp.2d 518 (M.D. Pa. 2003), and *Builes v. Nye*, 253 F.Supp.2d 818 (M.D. Pa. 2003), in which an alien testified against two major drug dealers as part of his plea agreement. At his sentencing hearing, the prosecutor described threats against him and his family as "credible." An immigration judge granted withholding, but the BIA reversed. After two of Builes' siblings were murdered within one week, the district court enjoined removal and the government did not appeal.

The government also decided to forego appeal in *Ezenwa v. INS*, 02-CV-1302 (M.D. Pa. March 24, 2003). The alien had aided the FBI in a sting operation. The court originally ordered a grant of withholding, and also held in the alternative that Ezenwa's removal would be unconstitutional, but subsequently amended its decision, remanding to the BIA for it to decide whether Ezenwa's offense barred withholding, and vacating its alternative holding.

The government prevailed in *Mommennia v. Estrada*, No. 3-03-CV-0525-BD, 2003 WL 21489731 (N.D. Tex. 2003). After a conviction, the alien agreed to infiltrate certain Muslim groups for the FBI. Seeking habeas review of a deportation order, he claimed that he assisted on the reasonable belief that the FBI would intervene to stop his deportation. There was no statement from a government official supporting petitioner's allegations that he would be in great danger if returned to Iran, and the witnesses to his dealings with the FBI, while acknowledging that he had asked if the agency could help prevent his deportation, did not testify that they had done more than suggest

that he apply for asylum.

### POTENTIAL ARGUMENTS IN RESPONSE

The most effective government arguments essentially contend that a court errs in extending the "state-created danger" doctrine to the circumstances of an alien informant. The doctrine almost exclusively arises: (1) in the context of 42 U.S.C. § 1981 or § 1983 actions for damages, not as a basis for enjoining the government from performing its lawful duties; (2)

**The S visa program, begun in 1994 and made permanent in 2001, is specifically tailored for aliens who are needed to provide information or testimony to law enforcement agencies.**

in cases in which the plaintiff was especially vulnerable or incapable of assessing the risk to himself (a potential problem with this argument, however, will arise where a government representative makes promises or statements to the alien that could be viewed as hindering his ability to clearly assess the risk of cooperation); and (3) where the conscience is shocked, and here DHS is simply attempting to enforce a lawfully executed removal order and the authorities have done nothing more than offer an opportunity to assist them in exchange for leniency – a deal that is struck by law enforcement officials everyday. See generally *County of Sacramento v. Lewis*, 523 U.S. 833, 847-48 (1998); see also *Abbott v. Petrovsky*, 717 F.2d 1191, 1192-93 (8th Cir. 1983) (individual has no constitutional right to be placed in a witness protection program); *Garcia v. United States*, 666 F.2d 960, 963 (5th Cir. 1982)(same).

In the alternative, the government can argue that the alien has not raised a colorable claim that the execution of his final order of removal would violate his constitutional rights. In *Reno v. AADC*, 525 U.S. 471 (1999), the Court said that, when deportation is sought, the alien is simply being held to the terms under which he

was admitted. Likewise here, the government can contend that if an alien's removal order itself is lawful, and his continuing presence in this country is an ongoing violation of the immigration laws, he cannot establish that it would be unconstitutional to enforce the order.

### NEGOTIATING AGREEMENTS WITH ALIEN INFORMANTS

AUSAs generally should try to avoid making promises or predictions about the outcome of removal proceedings or applications for relief from removal. In particular, they should refrain from putting in writing any such statements, or statements which endorse claims that an alien informant will face serious danger if he returns to his homeland. See 28 C.F.R. 0.197 (no plea agreement regarding removal except as authorized in writing by DHS). This applies to documents intended to pursue downward sentencing as well as those intended for the immigration authorities.

The exception to this rule is pursuit of a nonimmigrant S visa, which is the route an AUSA should take if convinced that an alien informant truly will be in danger if removed. Once properly cleared with his chain of command, an AUSA may promise only that he will sponsor the alien's application for an S visa. The S visa program, begun in 1994 and made permanent in 2001, is specifically tailored for aliens who are needed to provide information or testimony to law enforcement agencies. The visa allows the recipient to remain in the United States lawfully for up to three years, and can lead to adjustment to lawful permanent resident ("LPR") status. A law enforcement agency must sponsor the alien, with the concurrence of a U.S. Attorney or State's Attorney. The visa allows waiver of most exclusion grounds (two exceptions are the Nazi and genocide grounds). There is an annual quota of 200 visas for criminal-related cases and 50 for terrorist-related cases.

Contact: Alison Drucker, OIL  
☎ 202-616-4867

# Trafficking Victims Protection Act

The President recently signed legislation extending and expanding the Trafficking Victims Protection Act of 2000 (Pub. L. No. 106-386, Pub. L. No. 108-193) (December 19, 2003). The TVPA was originally enacted to enable federal law enforcement authorities to combat human trafficking, especially in the forms of sex slavery and forced labor, by gaining the cooperation of trafficking victims, many of whom are women and children. Traffickers use threats of deportation, forced confinement, and physical abuse to exploit their victims in what amounts to modern-day slavery. A conviction under the provisions of the TVPA carries a potential sentence of 20 years or more and restitution to the victims.

Under the TVPA, victims of severe form of trafficking could receive "T" nonimmigrant visas if they cooperated with federal law enforcement authorities in investigating or prosecuting trafficking or are under the age of 15, and removal from the U.S. would cause extreme hardship involving unusual and severe harm. (INA § 101(a)(15)(T)). The TVPA also authorizes T visa status for the spouse and children of the victim, and for the victim's parents if the principal visa holder is under the age of 21. (INA § 101(a)(15)(T)).

After 3 years of continuous presence in the U.S., during which time they have demonstrated good moral character and complied with requests for assistance by authorities, and if removal would result in extreme hardship, T visa holders may adjust to permanent resident status. INA § 245(l). The DHS is authorized to issue up to 5,000 T visas annually.

The reauthorization measure adds new provisions to the TVPA to better protect victims and to aid law enforcement authorities. A victim can now qualify for a T visa by cooperating with

state and local authorities, in addition to federal authorities. The age for which aliens are eligible for T visas without cooperating is raised from age 15 to age 18. Additionally, unmarried siblings under the age of 18 are now eligible to receive T visas if the principal visa holder is under the age of 21. Aliens applying for T visas now are no longer subject to the public charge ground of inadmissibility. INA § 212(d)(13). The TVPA also adds a border interdiction component to educate border guards and local law enforcement officials on how to identify and treat trafficking victims and to locate traffickers.

To aid in the prosecution of traffickers, the TVPA expands federal jurisdiction over foreign commerce and on the open seas, adds offenses to the RICO act to fight criminal enterprises, and allows for civil causes of action for

sex trafficking or involuntary servitude trafficking.

As of January 2004, the criminal section of the Civil Rights Division at DOJ has 142 open trafficking investigations and 111 traffickers have been charged in the past 3 years, resulting in 77 convictions or guilty pleas.

Recently, in announcing the sentencing of the largest human-trafficking case ever prosecuted by the Department, the Attorney General said that "slavery, human trafficking, and sexual servitude are crimes that wrench our hearts. They rob human beings of freedom. They strike at our nation's belief in the potential of every life. They are crimes that demand swift and implacable prosecution of the predators. They are crimes that deserve warmth and compassion for the victims."

By: Julie Iversen, OIL Law Intern  
☎ 202-616-4877

## CIS PROPOSES INCREASES IN APPLICATION FEES

The Bureau of Citizenship and Immigration Services has proposed a rule to increase the fee schedule of the Immigration Examinations Fee Account (IEFA) for immigration benefit applications and petitions, as well as for biometric information collection for applicants and petitioners. 69 Fed. Reg. 5088 (Feb. 3, 2004). The proposal raises application fees by approximately \$55 per application and by \$20 for biometrics collection. Application fees are deposited into the IEFA, which is the primary source of funding for the provision of immigration and naturalization benefits, administrative overhead, and for no charge services such as the processing of asylum claims.

The BCIS maintains the proposed fee increases are necessary to enhance national security. Since July 2002, the BCIS has added new security checks to the processing of applications that help law enforcement agencies identify threats to national security and screen for ineligible applicants, but these checks have resulted in increased costs that the current fee schedule does not reflect.

According to studies conducted by the BCIS, \$21 of the new fee will go towards the additional security checks. The BCIS also plans to use \$7 from each increased fee to fund program enhancements and new activities, such as improving refugee processing, providing naturalization services to military personnel, and conducting educational outreach to potential U.S. citizens. The new fees also allot \$23 per application for administrative support costs and \$4 per application for cost of living increases. The biometric fee will be raised from \$50 to \$70 to cover the digital collection of photos, signatures, and fingerprints.

By: Julie Iversen, OIL Law Intern  
☎ 202-616-4877

Contributions To The ILB  
Are Welcomed!



## Summaries Of Recent Federal Court Decisions

### ADJUSTMENT

#### ■Ninth Circuit Finds Indian Ineligible For Asylum, But Remands For Consideration Of Eligibility For Adjustment Of Status

In *Padash v. INS*, \_\_\_F.3d\_\_\_, 2004 WL 309095 (9th Cir. February 19, 2004) (*Reinhardt*, Siler, Hawkins), the Ninth Circuit found that substantial evidence supported the BIA's determination that the petitioner failed to establish past persecution or a well-founded fear of future persecution on account of a protected ground under the INA. The court, however, reversed the BIA's finding that petitioner was ineligible to adjust his status as a derivative beneficiary of his parents' visa, holding that the Child Status Protection Act of 2002 prevented the alien from "aging out" of his visa category due to delays in processing by the former INS.

The petitioner, a native of India and citizen of Iran, came to the United States with his mother in 1992, at the age of 17 one week after his father had gone missing. Shortly after his arrival petitioner's mother disappeared, leaving the petitioner in the care of relatives. The INS subsequently charged the petitioner as an overstayer. The petitioner then applied for asylum and withholding of removal from India and Iran, claiming that he feared persecution in India on account of his Moslem religion. As evidence, petitioner recounted two occasions, one of which the police intervened, when individuals came into his father's restaurant and started physical altercations, uttered religious slurs, and made threats. The petitioner requested asylum and withholding from Iran on the possibility that India could deny him reentry and he would be forced to join the Iranian military. The IJ denied asylum and withholding, find-

ing the petitioner had not established a well-founded fear of persecution. On March 1, 1996, while his appeal was pending before the BIA, a fourth-preference family visa petition that had been filed by his uncle and approved in 1984 became available. The petitioner filed a motion to expedite and reopen the proceedings, asserting that he was entitled to adjust his status as a child accompanying his parents. The BIA granted the motion and remanded to the

The court held that the Child Status Protection Act of 2002 prevented the alien from "aging out" of his visa category due to delays in processing by the former INS.

IJ, but a hearing was not held until June 24, 1997, 13 months after the petitioner's 21st birthday. The BIA affirmed the IJ's denial of the asylum claim and held that the petitioner was ineligible to adjust his status as a derivative beneficiary because he had "aged out."

Finding that the BIA's determination was supported by substantial evidence in the record, the Ninth Circuit affirmed the denial of asylum. In particular, the court noted that petitioner had presented no evidence to suggest that "these episodes were part of a pattern of discrimination against him or his family based on his religion." The court also found that petitioner's generalized statement that the government of India is "against Muslims," was insufficient to establish fear of future persecution. Finally, the court found insufficient evidence to establish his recruitment by the Iranian military was on account of a protected ground.

However, the court reversed and remanded the BIA's determination that the petitioner did not qualify for the Child Status Protection Act of 2002. The statute applies to a derivative beneficiary with a petition that was approved before he reached the age of 21, but who had "aged-out" while his application was pending. The statute applies "only if a final determination has not been made on the beneficiary's applica-

tion." See INA § 201(8). The court interpreted "final determination" to be the final determination of the matter, when no further action can be taken, and not the final determination by the agency, concluding that congressional intent was that the Act apply to individuals who had cases before the court who would have been entitled to adjust status if not for administrative delays.

Contact: Nancy Friedman, OIL  
☎ 202-353-0813

### ASYLUM

#### ■Eighth Circuit Affirms Guatemalan Asylum Denial Based on Substantial Evidence Standard

In *Menendez-Donis v. Ashcroft*, \_\_\_F.3d\_\_\_, 2004 WL 307451 (8th Cir. February 19, 2004) (*Arnold*, Lay, Riley), the Eighth Circuit affirmed the BIA's streamlined determination that petitioner failed to establish that a brutal attack on her by unidentified individuals was motivated by her actual or imputed political beliefs.

The petitioner, a native of Guatemala, entered the United States without inspection having fled Guatemala after she was beaten and gang-raped in her home. The petitioner requested asylum claiming that her rapists were guerillas who attacked her because they believed she was a government sympathizer. Four years prior to her attack, the petitioner's husband and husband's uncle were murdered after being approached by guerillas who suspected them of supporting the government. The petitioner was raped by three unidentified men, one of whom whose voice she thought she recognized as an acquaintance of a guerilla. After the petitioner fled to the United States, her 19-year old son was found beaten to death in Guatemala. The IJ denied asylum, finding that the petitioner failed to show that her attack was on the grounds of her political

(Continued on page 7)



## Summaries Of Recent Federal Court Decisions

(Continued from page 6)

beliefs and that it was linked to the guerillas, and otherwise it was just an ordinary crime. Furthermore, the war in Guatemala was over and reports by the State Department and human rights organizations did not find widespread retaliation by the guerillas. The BIA affirmed without opinion under 8 C.F.R. § 1001.1(a)(7).

The Eighth Circuit affirmed the IJ's denial of asylum, holding that substantial evidence supported the IJ's determination. Preliminarily, the court noted that its standard of review was governed by INA § 242(b)(4)(B),

which provides that on review "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." The court noted that language seems to have been drawn from the *Elias-Zacarias* decision, construing the former statutory provision, and elaborating on the

substantial evidence standard. "Under the substantial evidence standard, we cannot substitute our determination for that of the administrative fact-finder just because we believe that the fact-finder is wrong," said the court. "Rather, before we can reverse we must find that it would not be possible for any reasonable fact-finder to come to the conclusion reached by the administrator," it added. The court found that under the substantial evidence standard, a factual finding must be upheld if it is: first, supported by some substantial amount of evidence, which need not rise to the level of preponderance; second, the evidence must be substantial when the entire record is examined; and finally, the evidence must be such that it would be possible for the reasonable fact-finder to arrive at the same conclusion.

The court held that given the inconsistency in petitioner's testimony and

the information from the State Department, "there was more than a scintilla of evidence supporting the IJ's conclusion," that she did not have a fear of future persecution. The court also found that the lack of clear evidence as to the identity of her attackers or the motives for their attackers supported the IJ's conclusion that she had not been persecuted on a account of political opinion. "While we do not doubt that [petitioner] was the victim of a brutal crime, we are required to affirm the IJ's finding that it was not an act of political persecution," concluded the court.

In dissent, Judge Lay would have held that any reasonable fact-finder would agree that the attack on the petitioner was consistent with a pattern of attack on her family for failing to comply with the demands of the Guatemalan guerillas.

Contact: Mary Jane Canada, OIL  
☎ 202-616-9303

**"Under the substantial evidence standard, we cannot substitute our determination for that of the administrative fact-finder just because we believe that the fact-finder is wrong."**

### ■ Eighth Circuit Sustains Adverse Credibility Finding In Cameroonian Asylum Case

In *Nyama v. Ashcroft*, 357 F.3d 812 (8th Cir. February 6, 2004) (Arnold, Lay, Riley), the Eighth Circuit sustained the IJ's finding that the petitioner's asylum claim was not credible. The court found that the IJ properly considered evidence that the petitioner's asylum application was nearly identical to three other asylum applications filed by three different aliens. Given the evidence that the petitioner's claim was a fabrication, the court further found it reasonable for the IJ to demand additional evidence corroborating his claim to relief.

The petitioner, a citizen of Cameroon, illegally entered the United States in October 1999 after obtaining a visa to go to Jamaica. The petitioner

claimed that his father and brother had been members of the Social Democratic Front ("SDF"), a political opposition group in Cameroon, and that his father, a senior advisor, had been forced into hiding, and his brother had been arrested in 1991, badly beaten, and died of his injuries. Claiming that he was targeted because of his father and brother's affiliations with the SDF, the petitioner applied for asylum, withholding of removal, and withholding under CAT. The IJ found the petitioner incredible based on the existence of three other asylum applications claiming the same father, despite the petitioner's claim that he had no relatives in the United States, and his failure to corroborate his story. The IJ, believing that the petitioner's story was "entirely fabricated," denied the applications and ordered him removed. The BIA affirmed under its streamlining procedures.

The Eighth Circuit held that the applications of the other asylum applicants were properly admitted because they were offered to impeach the witness' credibility and were probative and fundamentally fair. Even if the applications were hearsay, the court noted that their admission was fundamentally fair and were highly probative of the authenticity of petitioner's asylum narrative. The court also rejected a due process challenge to the admissibility of the asylum applications, finding that the documents were not introduced until six months after they were introduced, giving petitioner sufficient notice. The court also deferred to the IJ's credibility determination because the similar asylum applications and the petitioner's inability to corroborate his claims constituted substantial evidence.

Contact: Joshua Braunstein, OIL  
☎ 202-305-0194

### ■ First Circuit Affirms Denial Of Algerian Petitioner's Asylum Application

In *Mekhoukh v. Ashcroft*, \_\_\_ F.3d \_\_\_, 2004 WL 259078 (1st Cir.

(Continued on page 8)



## Summaries Of Recent Federal Court Decisions

(Continued from page 7)

February 13, 2004) (Torruella, Cyr, Oberdorfer), the First Circuit sustained the BIA's decision denying asylum and withholding of removal, concluding that petitioner had failed to establish an objectively reasonable fear of future persecution based on his ethnicity, his actual or imputed political opinion, or his failure to serve in the Algerian military. The court also held that petitioner's hearing was not compromised by lack of counsel, inadequate translation, or the IJ's failure to develop the administrative record.

The petitioner, a citizen of Algeria and ethnic Berber, entered the United States in 1999 after having been denied asylum in New Zealand. The petitioner applied for asylum, withholding of removal, and protection under CAT. Since 1991, the Algerian government has engaged in a bloody conflict with the Islamic Salvation Front ("FIS"), an Islamic fundamentalist party. The petitioner claimed his fear of future persecution was based on a 1985 photograph of him with a Berber activist who was later assassinated by Islamic radicals, and his evasion of military service through the filing of fraudulent educational certificates. When the petitioner appeared for his hearing without counsel, despite being informed more than three months earlier that he had a right to counsel and having been provided with a list of contacts, the IJ denied a further continuance. The IJ accepted petitioner's proffer of what additional documentary evidence he would have presented had the hearing been continued, and then after the hearing denied relief, finding that the petitioner did not prove that his fear was well-founded or that there was a likelihood of future persecution. The BIA affirmed without opinion.

The First Circuit held that the petitioner's hearing was fair despite lack of counsel because the IJ had informed the petitioner of his right to counsel and gave him several months and a list of contacts in order to secure new counsel. The court also found that the hearing

was fair despite minor errors in translation because the merits of the petitioner's appeal were reached without relying on the IJ's adverse credibility finding. On the merits, the court held that petitioner did not establish by substantial evidence that he would be singled out for persecution because of his ethnicity, evasion of military service, or his perceived support of Berber causes, or that there was a pattern or practice of persecution of ethnic Berbers.

Contact: Paul Fiorino, OIL  
☎ 202-353-9986

### ■ Second Circuit Affirms Adverse Credibility Finding Based On Inconsistencies Between Alien's Airport Statement And Testimony

In *Ramsameachire v. Ashcroft*, 357 F.3d 169, (2d Cir. 2004) (Feinberg, Sotomayor, Parker), the Second Circuit sustained the BIA's adverse credibility finding and remanded proceedings to the BIA for further consideration of petitioner's request for protection under CAT. The court held that the BIA was entitled to base its adverse credibility determination on the inconsistencies between the alien's airport statement and later testimony, where the record reflected that the airport interview was not conducted under coercive or misleading circumstances.

The petitioner, a citizen of Sri Lanka, attempted to enter the United States via Haiti on July 28, 2000, using a fraudulent Canadian passport. Petitioner was placed in expedited removal and then interviewed as to his asylum claim. Petitioner stated at the airport interview that he was on his way to Canada to find a job and that if returned to Sri Lanka he would be arrested because he "went abroad illegally without permission." Petitioner was then referred for a "credible fear" interview,

where he stated that his fear or persecution was based on his membership in the Tamil ethnic minority and his suspected involvement with the Liberation Tigers of Tamil Eelam ("LTTE"), which had engaged in a prolonged civil war with the Sinhalese-controlled Sri Lankan government. The petitioner claimed the government repeatedly arrested and detained him.

Subsequently, petitioner was given a hearing before an IJ where he testified repeating many of his statements made at the credible fear interview. The IJ denied the request for asylum based solely on an adverse credibility determination made

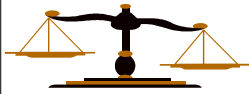
"The INS may rely on airport statements in judging an asylum applicant's credibility if the record of the interview indicates that it presents an accurate record of the alien's statements."

from inconsistencies in the petitioner's hearing testimony and airport interview in his reasons for leaving the country and his accounts of the arrests. The IJ also denied withholding under CAT finding that there was no testimony that petitioner would be tortured by the Sri Lankan government. The BIA affirmed the IJ's decision and refused to look at country conditions before denying the CAT claim.

Relying on *Balasubramaniam v. INS*, 143 F.3d 157 (3d Cir. 1998), the court held that, "the INS may rely on airport statements in judging an asylum applicant's credibility if the record of the interview indicates that it presents an accurate record of the alien's statements, and that it was not conducted under coercive or misleading circumstances." Here, the court found that the BIA's determination was supported by substantial evidence in the record which reflected that the petitioner understood the proceedings and that the interview could be considered reliable. The BIA's credibility determination precluded the petitioner from showing that he had a subjective fear of persecution. However, the court vacated the BIA's decision in part, holding that an adverse credibility finding does not necessarily preclude consideration of the petitioner's

(Continued on page 9)





## Summaries Of Recent Federal Court Decisions

(Continued from page 8)

CAT claim because the court must consider “all evidence relevant to the possibility of future torture.” 8 C.F.R. § 208.16(c)(2). Here, petitioner's CAT claim was based on his ethnicity and because he fled the country in an attempt to seek asylum. Thus, noted the court, petitioner's testimony regarding his persecution based on his ethnicity “is irrelevant to the possibility that he will be tortured for having attempted to seek asylum in the United States.”

Contact: Megan Brackney, AUSA  
☎ 212-637-2800

### ■Seventh Circuit Reverses Adverse Credibility Decision In Asylum Case Where Credible Fear Interview Not Conducted in Native Language

In *Ememe v. Ashcroft*, \_\_F.3d\_\_, 2004 WL 253552 (7th Cir. February 12, 2004) (*Flaum*, Manion, Williams), the Seventh Circuit vacated and remanded the IJ's decision denying asylum and withholding of removal, holding that absent a determination of the petitioner's language skills in the language used for the credible fear interview, the IJ's adverse credibility decision based on testimonial inconsistencies was not supported by substantial evidence on the record.

The petitioner, a citizen of Ethiopia and an ethnic Oromo, arrived in the United States with a fraudulent passport after having lived and worked in Italy for the previous seven years. The petitioner applied for asylum based on her Oromo ethnicity and past persecution by the Mengistu and Tigrian regimes of the Ethiopian government. The petitioner claimed that her father, a supporter of the Oromo Liberation Front (“OLF”), was arrested and died while in prison and that she was detained for five months and repeatedly raped by police officers, resulting in a pregnancy and eventual miscarriage. The petitioner went to Italy where she believed she saw one of the officers who raped her. After arriving in the United States,

an Italian translator was used to conduct the credible fear interview, because petitioner's counsel could not find an Amharic translator. However, an Amharic translator was provided at the hearing. The IJ denied the petitioner's applications for asylum and withholding on the bases of inconsistencies in her credible fear interview and her hearing testimony which made her incredible, her failure to corroborate events, and her failure to establish past persecution or the fear of future persecution. The BIA affirmed without opinion.

The Seventh Circuit held that, “absent an evaluation of [the petitioner's] language skills, the testimonial inconsistencies, alone, do not provide adequate support for the IJ's conclusion that [the petitioner's] testimony was not credible.” The court relied on the fact that the credible fear interviewer failed to clarify discrepancies in the petitioner's account and to ask follow-up questions to elicit information. The court noted that the inconsistencies may have been a reflection of language difficulties rather than incredibility, and that because the IJ did not assess the petitioner's proficiency in Italian, the record may be inaccurate and an evaluation could not be made. Moreover, said the court, unlike in *Mansour v. INS*, 230 F.3d 902 (7th Cir. 2000), where the court affirmed an adverse credibility determination, the petitioner's testimony before the IJ did not directly contradict her credible fear interview.

Contact: Hillel Smith, OIL  
☎ 202-353-4419

### ■Ninth Circuit Reverses Adverse Credibility Finding in Sikh Asylum Case

In *Singh v. Ashcroft*, \_\_F.3d\_\_, 2004 WL 193253 (9th Cir. January 30, 2004) (*Pregerson*, Paez; *Beam*, *dissent*-

*ing*), the Ninth Circuit reversed the IJ's adverse credibility finding and remanded proceedings, concluding that the inconsistencies identified by the IJ were either minor or were inappropriately based on speculation and conjecture.

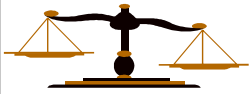
The petitioner, a citizen of India and a Sikh, applied for asylum, withholding of removal, and relief under CAT, claiming he had suffered past persecution partly on account of his religious beliefs. The IJ denied the applications based solely on an adverse credibility finding made from the petitioner's seemingly limited knowledge of the Sikh religion, discrepancies in the dates of events and details about his arrests, and the failure to mention electrical shock torture on his asylum application.

The Ninth Circuit found that the IJ's credibility finding was not supported by substantial evidence on the record and the petitioner must therefore be considered credible. The panel majority found that discrepancies that resulted from language or translation problems, the failure to submit a complete application, and minor discrepancies in dates did not properly constitute bases for an adverse credibility finding. The court held that the IJ improperly required the petitioner to provide additional documentation to corroborate his claims because he was credible and had sustained his burden of proof.

In dissent, Judge Beam would have found that the record, *as a whole*, supported the adverse credibility determination. “This appellate-court fact-finding appears to be nothing short of speculative,” noted the dissent.

Contact: Shelley Goad, OIL  
☎ 202-616-4864

**“This appellate-court factfinding appears to be nothing short of speculative.”**



## Summaries Of Recent Federal Court Decisions

### DUE PROCESS

#### ■Ninth Circuit Finds Immigration Judge Violated Petitioner's Procedural Due Process Rights When He Precluded Parts Of Petitioner's Testimony

In *Cardenas-Morfin v. Ashcroft*, \_\_\_F.3d\_\_\_, 2004 WL 94034 (9th Cir. January 20, 2004) (Wardlaw, Gould, Paez), the Ninth Circuit reversed a denial of cancellation and voluntary departure, finding that the IJ denied the alien a full and fair hearing by repeatedly preventing him from providing testimony to establish hardship to his qualifying relatives or his own good moral character.

The petitioner argued that his right to due process was violated when the IJ prevented him from testifying on his behalf about the hardship his daughter would suffer from separation and his support of his daughter's half-brothers. When making her good moral character determination, the IJ relied exclusively on evidence of falsified tax returns filed before the five-year statutory period that the INS was permitted to introduce.

The Ninth Circuit held that the petitioner was deprived of his due process right to a full and fair hearing when the IJ acted as "a partisan adjudicator" and denied him the opportunity to testify about his daughter's hardship and his good moral character. The separation was relevant in establishing exceptionally and extremely unusual hardship and its exclusion resulted in prejudice in consideration of the cancellation of removal. The petitioner's testimony about his support of his daughter's half-brothers was relevant to demonstrate good moral character in consideration of voluntary departure. The exclusion of the testimony was prejudicial to the

petitioner's request for relief and likely "affected the outcome of the proceedings." See *Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000).

Contact: Alison Igoe, OIL  
☎ 202-616-9343

### FOURTH AMENDMENT

#### ■Sixth Circuit Rejects Fourth Amendment Claim Where Alien Had Admitted Removability

The Ninth Circuit held that the petitioner was deprived of his due process right to a full and fair hearing when the IJ acted as "a partisan adjudicator."

In *Miguel v. INS*, \_\_\_F.3d\_\_\_, 2004 WL 354201 (6th Cir. February 26, 2004) (Norris, Gilman, Rogers), the Sixth Circuit upheld the IJ's denial of a motion to suppress without an evidentiary hearing, holding that because the petitioner admitted her removability and the IJ did not rely on the evidence in question to make his determination, the court did not have to address the application of the Fourth Amendment exclusionary rule to petitioner.

The petitioner, a citizen of Guatemala, entered the United States without inspection near San Ysidro, California in 1996. On July 7, 1997, agents from the INS knocked on the door of the petitioner's residence and were admitted into the house by a child. INS agents began to question the petitioner about her immigration status. Believing she had to answer, the petitioner told the agents that didn't have "papers from the United States," and then she produced a Guatemalan birth certificate. The petitioner was given a Notice to Appear and filed a motion to suppress the evidence acquired when INS entered and searched her home without a warrant and without advising her of her rights. The IJ determined a date to hold the evidentiary hearing on the motion to suppress, and the motion was subsequently denied when the petitioner failed to appear (she arrived late) and

because the IJ determined that there had been no egregious conduct by the agents. The petitioner admitted to the IJ that she was a native and citizen of Guatemala who had entered the United States without inspection and that she did not qualify for any form of relief from removal. The IJ ordered the petitioner removed. The BIA affirmed. The petitioner appealed, arguing that it was improper for the IJ to deny her motion to suppress without an evidentiary hearing.

The court held that because the petitioner admitted that she was a removable alien and that she didn't qualify for relief from removal, "an evidentiary hearing as to the possible egregious nature of the agents' entry into [her] home would therefore have been irrelevant." The court found that even if the petitioner's motion to suppress had been granted, her admissions had already established her removability and the evidence seized had not been used to establish the removability. See *In Matter of Burgos*, 15 I. & N. Dec. 278, 279-80 (BIA 1975). Because the evidence was not relied on by the IJ to make his decision, the court didn't have to reach the issue of whether the exclusionary rule applied. See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

Contact: Allen W. Hausman, OIL  
☎ 202-616-4873

#### ■First Circuit Rejects Fourth Amendment Exclusionary Rule Claim Where Conduct Was Not Egregious

In *Navarro-Chalan v. Ashcroft*, \_\_\_F.3d\_\_\_, 2004 WL 345676 (1st Cir. February 25, 2004) (Lynch, Lipez, Howard), the First Circuit held that the IJ properly admitted pre-arrest statements obtained by INS agents from the petitioner because the evidence was voluntarily given and there was no egregious conduct that could implicate the Fourth Amendment exclusionary rule.

(Continued on page 11)



## Summaries Of Recent Federal Court Decisions

The petitioner, a citizen of Peru, entered the United States in New Orleans on August 2, 1990 as a crewman and overstayed the duration of his landing privileges. In February 1996, the INS determined that the petitioner was working for a catering company at Logan Airport in Boston. INS agents questioned a group of the catering employees, including the petitioner. The agents asked the petitioner for his name and nationality, and he produced a driver's license and said he was from Peru. An INS agent filled out a Record of Deportable Alien (Form I-213) and the petitioner was arrested pursuant to an arrest warrant and later interrogated

The IJ ordered the petitioner deported in August 1998 and granted voluntary departure. The IJ had held an evidentiary hearing on the issue of whether the petitioner's statements from the day of his arrest should be suppressed, and concluded that the petitioner's statements were voluntary and that the Fourth Amendment exclusionary rule, absent extraordinary circumstances, did not apply to civil deportation hearings. The BIA summarily affirmed.

Relying on *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the court held that the petitioner's name is not information that can be suppressed as fruit of an unlawful arrest, that the petitioner's statement as to his alienage was voluntarily made before the arrest warrant was served when he was not in custody, and there was no evidence that the arrest violated the Fourth Amendment.

The court noted that in *Lopez-Mendoza*, the Supreme Court left a "glimmer of hope" that the exclusionary rule might apply in civil deportation hearings in cases of "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." The court found, however, that petitioner's claims did not reach this

level of egregiousness.

Contact: Alison Igoe, OIL  
☎ 202-616-9343

### JURISDICTION

#### ■Tenth Circuit Holds It Has No Jurisdiction To Review Untimely Asylum Application

In *Sviridov v. Ashcroft*, \_\_\_F.3d\_\_\_, 2004 WL 238854 (10th Cir. February 10, 2004) (Ebel, *Anderson*, Hartz), the Tenth Circuit determined that it lacked jurisdiction to consider petitioner's asylum application because it was not filed within one-year of his entry into the United States. The court also sustained the IJ's denial of petitioner's applications for withholding of removal and protection under CAT. The court found that the alien failed to credibly establish past persecution or a well-founded fear of future persecution in Russia on account of his political opinion.

The petitioner, a citizen of Russia, entered the United States on June 20, 1997, on a visitor's visa which was extended until December 19, 1998. On June 29, 2000, the petitioner filed an application for asylum based on persecution for political opinion and was subsequently placed in removal proceedings for overstaying his visa. The petitioner claimed that he had been detained for his association with a political group that opposed a candidate for the Duma. He claimed that he was detained a second time following an unlawful demonstration and that he was beaten. The IJ denied the asylum application for being untimely and found that the petitioner failed to demonstrate changed or extraordinary circumstances to excuse the delay. *See* 8 U.S.C. § 1158(a)(2)(B), (D). The IJ denied withholding of removal and protection under CAT because the petitioner failed to establish a probability of persecution due to his political opinions or that it was more likely than not he would be tortured upon return to Russia. The BIA affirmed under its streamlining procedures.

On appeal, the petitioner argued that under *Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003), the BIA's summary affirmance made it impossible to determine if the decision was affirmed on the reviewable basis of the merits of the asylum application or the unreviewable basis of the untimeliness. He also sought a *nunc pro tunc* stay of voluntary departure.

The Tenth Circuit held that the petitioner's due process was not violated by the BIA's streamlining procedures because the IJ's decisions denying withholding of removal and relief under CAT were supported by substantial evidence on the record. The court held that under INA § 208(a)(3), it did not have jurisdiction to review the timeliness of an asylum application. The court distinguished the petitioner's claim from *Haoud* because the IJ did not reach a decision on the merits of the claim, rather the asylum application was denied because it was untimely and the petitioner "failed to show extraordinary circumstances excusing the untimeliness." The court noted, however, that it was not holding "that there could never be a situation where a summary affirmance might leave us in doubt as to whether the agency's decision was on a reviewable or an unreviewable basis."

The court denied the petitioner's motion for a stay of voluntary departure *nunc pro tunc* because the time period to voluntarily depart had already expired and petitioner had failed to provide an explanation for why he had failed to file the motion earlier.

Contact: Susan Houser, OIL  
☎ 202-616-9320

#### ■Ninth Circuit Holds That It Lacks Jurisdiction To Consider Procedural Due Process Claim Not Raised Before The BIA

In *Barron v. Ashcroft*, \_\_\_F.3d\_\_\_, 2004 WL 235480 (9th Cir. February 10,  
*(Continued on page 12)*



## Summaries Of Recent Federal Court Decisions

(Continued from page 11)

2004) (Hall, *O'Scannlain*, Brown), the Ninth Circuit dismissed the petitioners' due process claim that the IJ improperly conducted their removal hearing in the absence of their counsel for lack of subject-matter jurisdiction, holding that the exhaustion doctrine barred it from deciding the merits of a legal claim not presented in administrative proceedings below.

The petitioners, husband and wife and citizens of Mexico, illegally entered the United States near San Ysidro, California in February 1985 and January 1988, respectively. The INS initiated removal proceedings against the petitioners on July 11, 1997.

The petitioners conceded their removability and requested relief through cancellation of removal or voluntary departure. The IJ proceeded with the petitioners' removal hearing, despite their counsel having failed to appear. The IJ denied cancellation of removal but granted voluntary departure. The BIA affirmed without opinion. A motion for a stay of removal was denied.

The petitioners appealed on the ground they were denied due process because their hearing was conducted in the absence of counsel and they were not given an opportunity to present their case, issues they failed to raise in their appeal to the BIA. The Ninth Circuit joined the 2nd, 3rd, 5th, 7th, and 11th Circuits in "squarely holding that INA § 242(d)(1) mandates exhaustion and therefore generally bars us, for lack of subject-matter jurisdiction, from reaching the merits of a legal claim not presented in administrative proceedings." The court noted that although there may be constitutional claims not subject to exhaustion because not within the competence of the BIA, due process claims not subject to exhaustion must involve more than "mere procedural error" that

the BIA can remedy. Here, the absence of counsel and lack of an opportunity to present a case, could have been addressed by the BIA and therefore were subject to exhaustion.

Contact: John L. Davis, OIL  
☎ 202-514-3715

### ■Seventh Circuit Holds That Petitioner Waived Due Process Claim First Presented at Oral Argument

In *Szczesny v. Ashcroft*, \_\_F.3d\_\_, 2004 WL 260589 (7th Cir. February 12, 2004) (Bauer, Manion, Rovner), the Seventh Circuit denied the petitioner's appeal, finding that the petitioner waived his argument that the district director's rescission of his lawful permanent resident status violated his right to due process, because his counsel did not present that claim to the court until oral argument.

The petitioner, a citizen of Poland, entered the United States in 1989 on a six-month visitor's visa. In 1995 the petitioner won the Diversity Immigrant Lottery and he applied for and received LPR status. However, the INS district director sent a notice of intent to rescind the change in status when it was discovered that the petitioner had submitted multiple petitions for the 1995 lottery. When the petitioner failed to respond to the notice, his LPR status was rescinded without a hearing pursuant to 8 C.F.R. § 246.2 and deportation proceedings were initiated. The petitioner filed a motion to terminate the proceedings, arguing that his due process rights were violated because he never received notice that his status was being rescinded. The IJ denied the petitioner's motion to terminate the proceedings without reaching a decision on the merits, holding he lacked jurisdiction to review the rescission order but granted his request for voluntary departure. The BIA summa-

rily affirmed.

The Seventh Circuit held that the petitioner waived his due process argument by waiting until oral argument to present his claim. *See Awe v. Ashcroft*, 324 F.3d 509, 512-13 (7th Cir. 2003). The petitioner was therefore unable to demonstrate that he was prejudiced by lack of notice and the court concluded his due process claim was meritless. *See Roman v. INS*, 233 F.3d 1027, 1033 (7th Cir. 2000).

Contact: Luis Perez, OIL  
☎ 202-353-8806

### MOTION TO REOPEN

#### First Circuit Upholds Board's Denial Of Congolese Alien's Motion To Reopen Based On Allegedly Changed Circumstances

In *Mabikas v. Ashcroft*, \_\_F.3d\_\_, 2004 WL 307221 (1st Cir. February 19, 2004) (Boudin, *Lourie*, Lynch), the First Circuit, consolidating two petitions for review, held that the BIA did not abuse its discretion in denying petitioner's motion to reopen proceedings, and that substantial evidence supported the BIA's asylum denial.

The petitioner, a citizen of the Congo, came to the United States as a visitor in October 1996 with authorization to stay until September 1997. In April 1997, civil war broke out in the Congo and the petitioner learned that members of his family had disappeared and his home had been destroyed. The petitioner filed for asylum, withholding of removal, and protection under CAT, claiming fear of persecution because his father had been a tax collector and customs inspector in the government that had been ousted during the civil war. The IJ denied the claims, finding that the petitioner couldn't establish that the disappearance of his family or destruction of his house was on account of a statutorily protected ground. The BIA upheld the IJ's denial, finding that even if the petitioner had established a nexus between the disappearances and the destruc-

(Continued on page 13)

**"INA § 242(d)(1) mandates exhaustion and therefore generally bars us, for lack of subject-matter jurisdiction, from reaching the merits of a legal claim not presented in administrative proceedings."**

## SUMMARIES OF FEDERAL COURTS DECISIONS

(Continued from page 12)

tion, he wouldn't have a well-founded fear because there was a cease-fire and amnesty in place. Six months later the petitioner filed a motion to reopen, citing a decline in country conditions and the breakdown of the cease-fire and amnesty. The BIA denied that motion finding that the continuing civil war did not amount to changed country conditions.

The court upheld the BIA's denial of the motion finding that the country conditions reports that he submitted did not demonstrate that "the recent breakdown in the Congo would subject tax collectors and customs inspectors — let alone — their children to persecution."

The court also found that the petitioner had failed to demonstrate past persecution or a well-founded fear of future persecution in the Congo on account of a protected ground. In particular, the court found that petitioner had not shown that petty officials employed by the former government have been subject to persecution by the new government.

Contact: Anthony Norwood, OIL  
☎ 202-616-4883

### ■First Circuit Affirms BIA's Denial Of Algerian Alien's Motion To Reopen Based On Ineffective Assistance Of Counsel

In *Betouche v. Ashcroft*, 357 F.3d 147 (1st Cir. 2004) (Torruella, *Cyr*, Oberdorfer), the First Circuit affirmed the BIA's denial of the petitioner's motion to reopen. The court noted the petitioner's failure to submit: (1) an affidavit describing the agreement he entered into with prior counsel, and (2) evidence that he had notified prior counsel that a bar complaint had been filed. The court additionally observed the petitioner's failure to adduce any evidence of changed conditions in Algeria, which would have supported reopening on separate grounds.

The petitioner, a citizen of Algeria, entered the United States in July 1996 on a temporary visa and overstayed. The INS charged him with being removable and the petitioner retained counsel to apply for asylum and withholding of removal on the basis of his membership in a pro-Western socialist party whose members are allegedly targeted by Algeria's fundamentalist party. On August 13, 1998, an IJ denied the asylum and withholding applications and found the petitioner removable. Counsel for the petitioner filed an appeal two days after the deadline, which was denied as untimely. The petitioner then submitted a motion to reopen to the IJ in May 2002, claiming that conditions in Algeria had deteriorated since August 1998. The motion was denied because the petitioner failed to produce evidence of "materially changed" conditions. Subsequently, the petitioner retained new counsel who appealed to the BIA and filed a motion to reopen based on ineffective assistance of counsel for the late appeal. The BIA rejected the appeal, holding that there was no evidence of changed conditions in Algeria, and denied the ineffective assistance of counsel claim for failure to comply with *Matter of Lozada*.

The First Circuit found that the petitioner had failed to comply with the first two procedural criteria under *Matter of Lozada*, and therefore the BIA's denial of the motion to reopen did not constitute an abuse of its discretion. Specifically, the court found that petitioner's unsworn letter attesting to the terms under which counsel was attained did not meet the affidavit requirement. Additionally, petitioner failed to produce evidence that he had notified his previous attorney of the ineffective assistance of counsel claim and given him an opportunity to respond. Finally, the court found that the petitioner failed to corroborate his claim of changed country conditions in his motion before the BIA, because he failed to include those documents at his asylum hearing.

Contact: Joshua Braunstein, OIL  
☎ 202-305-0194

## WAIVER

### ■Second Circuit Holds Petitioner's Conviction At Trial Forecloses § 212(c) Detrimental Reliance Argument

In *Swaby v. Ashcroft*, \_\_\_ F.3d \_\_\_, 2004 WL 193576 (2d Cir. February 3, 2004) (Walker, Kearse, *Carbranes*), the Second Circuit held "that the decision to go to trial, as a matter of law, forecloses any argument of detrimental reliance on the availability of § 212(c) relief, and that IIRIRA's repeal of § 212(c) is not impermissibly retroactive."

The petitioner, a native of Jamaica and a citizen of the United Kingdom, was an LPR who entered the United States in 1970. In 1990, he was convicted of second-degree burglary and unlawful possession of marijuana and received a sentence of 3-9 years. On August 11, 1999 the INS charged him with being removable for being convicted of an aggravated felony. The petitioner claimed that he had detrimentally relied on the existence of § 212(c) when he rejected the government's plea offer and tried to prove his innocence in court. The IJ concluded that the petitioner was ineligible for a § 212(c) discretionary waiver because it had been repealed by IIRIRA. The BIA affirmed. Petitioner then filed a habeas petition. When the district court denied that petition, petitioner was removed from the United States.

The Second Circuit found that petitioner's claim presented a live case or controversy because he would suffer a bar to reentry for being removed as an aggravated felon. The case was distinguishable from *INS v. St. Cyr*, 533 U.S. 289 (2001), because the petitioner did not rely on § 212(c) when taking a plea; rather, he rejected a plea and was convicted at trial. The court relied on *Reno v. Rancine*, 319 F.3d 93 (2d Cir. 2003), holding that the repeal of § 212(c) does not have an impermissibly retroactive effect on aliens convicted at trial rather than aliens convicted as a result of a plea bargain.

Contact: Kristen Chapman, AUSA  
☎ 718-254-7000

## CASES SUMMARIZED IN THIS ISSUE

<i>Barron v. Ashcroft</i> .....	11
<i>Betouche v. Ashcroft</i> .....	13
<i>Cardenas-Morfin v. Ashcroft</i>	10
<i>Ememe v. Ashcroft</i> .....	09
<i>Jama v. INS</i> .....	01
<i>Leocal v. Ashcroft</i> .....	01
<i>Mabikas v. Ashcroft</i> .....	12
<i>Mekhoukh v. Ashcroft</i> .....	08
<i>Menendez-Donis v. Ashcroft</i> ..	06
<i>Miguel v. INS</i> .....	10
<i>Navarro-Chalan v. Ashcroft</i> ..	10
<i>Ngwanyia v. Ashcroft</i> .....	01
<i>Nyama v. Ashcroft</i> .....	07
<i>Padash v. INS</i> .....	06
<i>Ramsameachire v. Ashcroft</i> ..	08
<i>Singh v. Ashcroft</i> .....	09
<i>Sviridov v. Ashcroft</i> .....	11
<i>Swaby v. Ashcroft</i> .....	13
<i>Szczesny v. Ashcroft</i> .....	12

## NOTED WITH INTEREST

On a typical day employees at the USCIS process 140,000 national security background checks, receive 100,000 web hits, take 50,000 calls at the Customer Service Centers, adjudicate 30,000 applications for an immigration benefit, see 25,000 visitors at 92 field offices, issue 20,000 green cards, and capture 8,000 sets of fingerprints.

*The goal of this monthly publication is to keep litigating attorneys within the Departments of Justice and Homeland Security informed about immigration litigation matters and to increase the sharing of information between the field offices and Main Justice. This publication is also available online at <https://oil.aspensys.com>. If you have any suggestions, or would like to submit a short article, please contact Francesco Isgro at 202-616-4877 or at [francesco.isgro@usdoj.gov](mailto:francesco.isgro@usdoj.gov). Please note that the views expressed in this publication do not necessarily represent the views of this Office or those of the United States Department of Justice.*

## IMMIGRATION LITIGATION CONFERENCE

*(Continued from page 1)*

Against Torture. As in prior years, we expect the participation of senior officials from the Department of Justice, the Department of Homeland Security, and the Department of State.

The Annual Immigration Litigation Conference is designed for government attorneys, including Assistant and Special Assistant United States Attorneys, DHS attorneys, and attorneys from EOIR who litigate or assist in the litigation of civil immigration cases. The Conference will also be useful to Federal prosecutors who are involved with task forces established to locate, apprehend, and to prosecute or remove aliens subject to final orders of removal. The Conference has been accredited for CLE credits in prior years, and we expect that it will again be approved.

Government attorneys who wish to attend should register for the Conference by sending an e-mail to:

[francesco.isgro@usdoj.gov](mailto:francesco.isgro@usdoj.gov)

The e-mail should provide the full name and title of the attendee, the mailing address, and the official e-mail address and telephone number. Subject to space availability, registra-

tion will remain open until April 23, 2004. Attendees will be responsible for their own hotel, travel, and per diem costs. Registration and training materials are provided at no cost.

OIL has contracted with four hotels which will provide rooms at the government rate. It is *exceptionally difficult* to book Washington hotel rooms at the government rate in May. Attendees are *strongly urged* to make their reservations ASAP, and no later than April 1, 2004. The hotels are:

Hilton Garden Inn (1-877-782-9444);  
Latham Hotel (800-368-5922);  
Georgetown Inn (800-368-5922); and  
Churchill Hotel (800-424-2464).

Additional information about these four hotels can be found on the OIL web site. Questions regarding hotel accommodations and requests for any special need should be directed to Kurt Larson at 202-616-9321.

The preliminary agenda with the list of speakers will be available on the OIL web site and will be updated regularly.



*“To defend and preserve  
the Executive’s  
authority to administer the  
Immigration and Nationality  
laws of the United States”*

If you are not on our mailing list or for a change of address please contact  
[francesco.isgro@usdoj.gov](mailto:francesco.isgro@usdoj.gov)

**Peter D. Keisler**  
Assistant Attorney General  
United States Department of Justice  
Civil Division

**Daniel Meron**  
Deputy Assistant Attorney General

**Thomas W. Hussey**  
Director

**David J. Kline**  
Principal Deputy Director  
Office of Immigration Litigation

**Francesco Isgro**  
Senior Litigation Counsel  
Editor

**Julie Iversen**  
Law Intern